APPENDIX A

Filed Nov. 26, 1962

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15,496

In the Matter of

MERRITT-CHAPMAN & SCOTT CORPORATION, *Petitioner*

v.

HONORABLE W. WALLACE KENT, United States District Judge for the Western District of Michigan, *Respondent*.

Order

Before: CECIL, Chief Judge, MILLER and WEICK, Circuit Judges.

Upon consideration,

IT IS ORDERED that the petition to prohibit respondent from continuing as trial judge in the case of Mackinac Bridge Authority v. Merritt-Chapman & Scott Corporation, et al. be denied on the authority of *Samuel G. Albert v. United States District Court for the Western District of Michigan, Northern Division*, 283 F. 2d 61 (CA 6, 1960), cert. denied 365 U.S. 828 (1961).

PAUL C. WEICK
United States Circuit Judge

APPENDIX B

UNITED STATES OF AMERICA
THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Civil Action No. 761

MACKINAC BRIDGE AUTHORITY, a Michigan municipal corporation, *Plaintiff*,

v.

MERRITT-CHAPMAN & SCOTT CORPORATION, a New York corporation, and

PRE-PAKT CONCRETE COMPANY, an Ohio corporation, *Defendants*.

Motion to Dismiss Counts 2 to 7 Inclusive of Plaintiff's Complaint, or in the Alternative, to Require Amendment Thereof

NOW COMES the above named Defendant, Merritt-Chapman & Scott Corporation herein referred to as Merritt, and moves, that Counts 2 to 7 inclusive of the Complaint filed by Plaintiff, Mackinac Bridge Authority, also referred to herein as the Authority, be dismissed because of its failure to state in separate counts the separate claims of the Plaintiff as required in Rule 10B of the Federal Rules of Civil Procedure, or, in the alternative, to require Plaintiff to amend Counts 2 to 7 inclusive of its Complaint, to conform to the requirements of said Rule that each claim founded in a separate transaction be stated in a separate count whenever a separation facilitates the clear presentation of the matters set forth, and if an Order to Amend is made and Plaintiff does conform, then Merritt moves that it be allowed a further time in which to answer the Complaint as amended.

The grounds for this motion are as follows:

1. By the use of the principle of incorporation by reference; all of the Plaintiff's counts, subsequent to Count 1, state from two up to seven claims, which claims are not stated alternately or hypothetically, and said claims sound in contract and for tort and for breach of warranty. Specifically the claims thus stated cumulate as follows:

COUNT TWO includes the claim of Count One for breach of contract by Merritt and Pre-Pakt, and adds claim of breach of Merritt of duty to exercise due care in performance of contract "commensurate with that of a reasonably prudent person in the occupation and under these circumstances" and alleges both negligence and gross negligence.

COUNT THREE includes claim of breach of contract of Merritt and Pre-Pakt under Count One, claim of negligence and gross negligence of Merritt under Count Two and adds claim of negligence against Pre-Pakt.

COUNT FOUR includes claim of joint breach of contract in Count One, negligence of Merritt in Count Two, negligence of Pre-Pakt in Count Three and adds claim that Merritt and Pre-Pakt breached their duty "by their gross and wanton neglect to use that degree of care required in the premises."

COUNT FIVE includes all of claims made in preceding counts of joint breach of contract and joint and several negligence and adds claim of warranty by Merritt and Pre-Pakt of quality and fitness for purpose of all materials supplied by them and failure of materials to conform to alleged warranties.

COUNT SIX includes preceding claims of breach of contract, joint and several negligence and negligence and

breach of warranty and adds claim of breach by Merritt and Pre-Pakt of alleged express and implied warranties of the method of mixing and laying cement and that the same "would be free of latent and patent defect.

COUNT SEVEN includes all of the foregoing claims and adds claim of warranty by Merritt and Pre-Pakt expressly and impliedly by recognition of customs and usages in marine contracting trade as to proper construction and soundness of all caissons and cofferdams, including Pier 17, performance of work according to plans and specifications without latent or patent defects and construction done according to generally recognized standards of trade of marine construction.

2. Such a separation of claims in separate counts is necessary to facilitate a clear presentation of the matters set forth.

3. Unless such a separation of claims is set forth, it will be impossible for Defendant Merritt to amend its Answer to plead intelligently to said counts.

4. The use of such "mongrel" counts is contrary to the purpose and intent of the requirements of Rule 10B.

5. The use of such "mongrel" counts will needlessly complicate the trial of this case and the presentation of the claims of the Plaintiff to the jury, both with respect to the presentation of evidence and the charge of the Court as to such claims, and the rule of damages with respect thereto, if the case is permitted to go to the jury.

6. If the jury should return a verdict for the Plaintiff, it would be impossible to determine upon what basis the verdict was reached, and, if damages were allowed, it would be impossible to determine whether a proper measure of damages had been adopted.

This motion is based upon the files in this case, upon the Federal Rules of Civil Procedure, particularly Rule 10B thereof.

DEEB, DUNN & ELFERDINK
Attorneys for Defendant
Merritt-Chapman & Scott
Corporation

By .....
JOSEPH F. DEEB

Business Address:
600 Michigan Trust Building
Grand Rapids 2, Michigan

MANNING, HOLLINGER & SHEA
Of Counsel

Business Address:
41 East 42nd Street
New York 17, New York

APPENDIX C

"JOSEPH F. DEER, MESSRS. DEER DUNN & ELFERDINK
SUITE 600 MICHIGAN TRUST BLDG GRAND RAPIDS MICH.

I HAVE ADVISED MERRITT CHAPMAN & SCOTT CORPORATION AS TO THE FACTS WHICH YOU HAVE JUST COMMUNICATED TO ME. SOME OF THOSE FACTS WITH RESPECT TO COURT PROCEDURE I KNEW BEFORE OTHER FACTS DEALING WITH THE TRIAL JUDGE'S RELATIONS OUTSIDE OF COURT WITH PLAINTIFF'S COUNSEL WE HAD NOT KNOWN BEFORE. BECAUSE THESE ADDITIONAL FACTS ARE OF SUCH A SERIOUS NATURE VIEWED IN THE LIGHT OF THE REMAINING FACTS REFERRED TO WE REQUEST THAT YOU IMMEDIATELY CONTACT THE COURT AND REQUEST THAT THE COURT HOLD IN ABEYANCE ANY AFFIRMATIVE ACTION IN BEHALF OF THIS DEFENDANT PENDING DETERMINATION AS TO WHAT COURSE IT WILL TAKE WITH RESPECT TO THE TRIAL JUDGE. THAT MATTER SHOULD BE DETERMINED TODAY."

JAMES J. A. GALLAGHER

September 17, 1962

"Honorable W. Wallace Kent
Chief Judge
United States District Court
Federal Building
Grand Rapids 2, Michigan

RE: Mackinac Bridge Authority v. Merritt-Chapman & Scott Corporation and Prepakt Concrete Company. Civil Action 761

"Sir:

"The attached telegram from Mr. James J. A. Gallagher of the firm of Manning, Hollinger & Shea, New York City, representing Merritt-Chapman & Scott Corporation, dated today, indicates at least the possibility of an affidavit of prejudice by Defendant Merritt-Chapman & Scott being filed in this matter, pursuant to the provision of Title 28, U.S.C.A. Sec. 144.

"The authorities are in substantial agreement with the opinion of the Circuit Court of Appeals of this circuit

(*Refior v. Lansing Drop Forge Company*, 124 F. 2d. 440) that the aforesaid statute does not permit a litigant, after he has knowledge of the alleged bias or prejudice and without notice, to go forward in the cause before filing such affidavit, after facts of disqualification are known to him.

"Because of this, notice to this trial court, (including the attached copy of telegram) and even more especially, if an affidavit is filed, it would appear that until the matter referred to in the telegram is disposed of, the present status of the case must be maintained and Defendant Merritt should not ask affirmative action of this Court upon Defendant Merritt's Motion filed August 21, 1962.

Very truly yours,

JOSEPH F. DEEB

J.F.D/wn
1 Enc.

(See addition to this letter, following sheet)

"Honorable W. Wallace Kent September 18, 1962

"P.S. We have delayed service of this notice upon you in an effort to get final word from Merritt as to what its independent decision is as to the filing of Affidavit of Prejudice. We have just been advised that Defendant Merritt desires to file such an affidavit, and the same should be filed today.

J.F.D."

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Civil Action No. 761

MACKINAC BRIDGE AUTHORITY, a Michigan municipal corporation, *Plaintiff*,

v.

MERRITT-CHAPMAN & SCOTT CORPORATION, a New York corporation,

and

PRE-PAKT CONCRETE COMPANY, an Ohio corporation, *Defendants*.

Transcript of Proceedings

had in the above-entitled cause, before Honorable W. Wallace Kent, Chief Judge, Presiding; Honorable Noel P. Fox, District Judge, and Honorable Raymond W. Starr, Senior Judge, at Grand Rapids, Michigan, on September 21, 1962.

Appearances:

Miller, Canfield, Paddock & Stone, Detroit, Michigan, by Mr. George E. Bushnell, Jr., on behalf of the Plaintiff;

Deeb, Dunn & Elferdink, Grand Rapids, Michigan, by Messrs. Joseph F. Deeb and Earl Waring Dunn, on behalf of the Defendant Merritt-Chapman & Scott Corporation.

Judge Kent: This is Civil Action No. 761, in the Northern Division, Mackinac Bridge Authority against Merritt-Chapman & Scott Corporation, and others, which is before the court an an affidavit of prejudice and certificate of counsel filed by the defendant Merritt-Chapman & Scott Corporation.

All right, Mr. Deeb. Do you want to be heard?

Mr. Deeb: Not at this time, Your Honor. The affidavit, certificate and application in connection with the matter is on file for the court's consideration.

Judge Kent: Mr. Bushnell?

Mr. Bushnell: May it please the court: I am shocked, overwhelmed, dumfounded, and amazed at the appalling lack of judgment that this petition represents.

With the court's permission, I shall not speak to this affidavit of bigotry and ignorance that has been executed by one McSlough in New York, but rather, I would address myself to the question of the certificate, which is required under Section 144 of Title 28, United States Code.

As Your Honors are well aware, this section of the act must be strictly construed; and as Your Honors are well aware, a certificate as required by Section 144 is a sine qua non without which hearing on this matter cannot proceed.

I direct the court's attention to the certificate of counsel and as signed by Joseph F. Deeb and Earl Waring Dunn, and particularly I direct your attention to the following clause:

> ". . . and the undersigned are informed as to the proceedings herein, and that the Affidavit and Application attached hereto are made in good faith and not for the purpose of hindrance or delay."

Your Honors are thoroughly familiar with the subject matter of this so-called affidavit of prepudice. As an officer of this court, I would inform the court that the substance of the matters therein set forth, specifically the chief judge's attendance at a gathering in Philadelphia, Pennsylvania, next week, was communicated by myself to Mr. Deeb at least two months ago. This communication was made as an act of courtesy to opposing counsel, and in accordance with what I understand to be the regular

rules of practice and common decency as between counsel at bar.

Further, I undestand and do believe that Earl Waring Dunn is an active member of fraternal Masonic parties in Grand Rapids; and I ask Your Honors to, in effect, take judicial notice of the fact that the chief judge's nomination for Masonic recognition was widely publicized in the public press approximately one year ago, in September of 1961. I further submit that Mr. Dunn's regular mail, I do believe, would carry notification of this fact to him; and, therefore, as a certificating attorney, he has had knowledge of this fact for the better part of a year. I further suggest that the affidavit, itself, was prepared by Dunn and submitted for execution by this man, McSlough, in New York.

I think the conclusion—

Mr. Deeb: Your Honor, please, the name is McGlough.

Mr. Bushnell: I repeat: I think the conclusion is inescapable, and I put it to Your Honors that the conclusion is inescapable, that the only purpose for filing this application, submitting an affidavit of bigotry and ignorance—and I emphasize that—and perpretrating a certificate of this sort upon this court, was for the purpose of hindrance and delay; and, therefore, this matter should be stricken from this court's records.

Judge Kent: Do you have anything to say, Mr. Deeb?

Mr. Deeb: I will not undertake to answer abuse by abuse, Your Honor.

Judge Kent: The record should show that I have with me today, because of the nature of this situation, my associate, Noel P. Fox, who was named to this court last month. Without having any direct knowledge, I understand that he has been honored by a fraternal organization.

Is that correct, Judge Fox?

Judge Fox: Several.

Judge Kent: The record may also show that Judge Starr, who is a senior judge of this court, was made a 33rd Degree Mason several years ago.

With respect to the present proceeding:

On September 6, 1960, this action was commenced by the plaintiff by the filing of a complaint with the clerk of this court at Marquette, Michigan. Since that time there have been a number of conferences in an effort to limit the issues and expedite the discovery procedures used in connection with the action. Formal hearings have been had on more than one motion and a further hearing was scheduled for Tuesday, September 18, 1962, on a motion filed by the defendant, Merritt-Chapman & Scott Corporation. At that time and at the request of counsel for the defendant the hearing was delayed to afford the defendant, Merritt-Chapman & Scott, an opportunity to file an affidavit of prejudice which was filed on September 19, 1962. The affidavit is by Myles C. McGough, Executive Vice-President of Merritt-Chapman & Scott Corporation. Attached to the affidavit is a certificate by Joseph F. Deeb and Earl Waring Dunn, counsel of record for the defendant Merritt-Chapman & Scott, in which they certify that the affidavit and application for disqualification are made in good faith and not for the purpose of hindrance or delay.

The affidavit may be summarized as follows:

It alleges that George E. Bushnell, Sr., is Sovereign Grand Commander of the Ancient Accepted Scottish Rite of Free Masonry for the Northern Masonic Jurisdiction of the United States of America.

It alleges that George E. Bushnell, Sr., is listed "Of Counsel" for the legal firm of Miller, Canfield, Paddock & Stone of Detroit, Michigan, attorneys for the plaintiff.

It alleges that George E. Bushnell, Jr., is the trial attorney for the plaintiff in this case.

It alleges that George E. Bushnell, Jr., has previously received the 33rd Degree in Scottish Rite Masonry.

It alleges that the trial judge, W. Wallace Kent, has been offered and has accepted the Honorary 33rd Degree in Scottish Rite Masonry subject to the conferring thereof during the week of September 24, 1962, in Philadelphia, Pennsylvania.

It alleges that such a degree cannot be given nor conferred except with the knowledge and consent of the Sovereign Grand Commander.

It alleges that Judge W. Wallace Kent was recently Grand Master of the Grand Lodge of Free and Accepted Masons of the State of Michigan, and that he is a member of the Scottish Rite of Free Masonry.

It alleges that these facts create prejudice and bias on the part of Judge W. Wallace Kent in favor of the Mackinac Bridge Authority, plaintiff in the above case, and requests that another judge be assigned to hear the case.

It alleges that the prejudice and bias has already been demonstrated in certain ways to the benefit of plaintiff and to the irreparable detriment of defendant Merritt-Chapman & Scott, and that the said trial judge, W. Wallace Kent, has made it impossible for defendant Merritt-Chapman & Scott to complete its present discovery proceedings as well as further discovery proceedings prior to the date again set within the past few days by the said trial judge.

Except for the allegations of bias or prejudice I have every reason to believe that the statements made are substantially true although incomplete. The truth of the affidavit cannot be adjudicated by the judge involved or by anyone else. *Berger* v. *United States*, 1921, 255 U.S. 22.

The facts should be supported to some extent. The Masonic Fraternity exists in every state of the United

States. The Grand Lodge of each state is sovereign within its state. There are many appendant organizations, including the Ancient Accepted Scottish Rite of Free Masonry, which depend upon Masonic affiliation for their members. Such appendant organizations meet and accept members only by and with the consent of the Grand Lodge of the state in which they exist. There are approximately four million Masons in these United States. Approximately 965,000 are members of the Scottish Rite. Each Grand Lodge and each appendant organization promotes and supports community and charitable activities worth many millions of dollars each year. The Scottish Rite of Free Masonry for the Northern Masonic Jurisdiction has for many years supported a program of research into the causes of mental disease. This program is supported by all the members of the organization, which operates under the direction of the Grand Commander and the Supreme Council.

Each year in September the Supreme Council meets and confers the 33rd Degree upon a class of candidates and nominates a group of distinguished Masons and citizens to receive the 33rd Degree during the following September.

The sessions of the Supreme Council, which is composed of forty-four active members, are presided over by the Sovereign Grand Commander. Presumably no person will be nominated or will receive the 33rd Degree if there is an objection from one of the active members of the Supreme Council. It is considered a distinct honor to receive the 33rd Degree and join that group of distinguished citizens which includes the Chief Justice of the United States, General Douglas MacArthur, General Mark Taylor and former President Harry S. Truman.

The defendant's affidavit is filed pursuant to the provisions of Section 144, Title 28, United States Code, which provides as follows:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit

that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

It is clear that it is my duty as the district judge against whom the affidavit has been filed to determine the legal sufficiency of the affidavit. *Green* v. *Murphy*, 259 F. 2d 591, (C.A. 3, 1958). In that case the court stated at page 593:

"We are of the opinion that the case at bar is ruled by legal principles which, although they may have been cloudy in the past, are now clearly defined. It is now settled law that the judge against whom an affidavit of bias and prejudice is filed unedr Section 144, must himself pass on the legal sufficiency of the facts alleged and that in so doing he must accept the allegations of the affidavit as true. A United States District Judge therefore possesses the jurisdiction, the power, to pass upon the question as to whether he must withdraw from the case by reason of the allegations of his disqualification contained in the affidavit."

See also *Berger* v. *United States*, 255 U.S. 22, 1921.

The requirement contained in Section 144 of Title 28, United States Code, that the affidavit state the facts

and the reasons for the belief that bias or prejudice exists is discussed in *Hiatt v. United States*, 170 F. 2d 273, a decision of the Court of Appeals for the District of Columbia in 1948, wherein that court stated at page 278:

> "The basis for disqualification upon affidavit is that the judge has personal bias or prejudice either against the affiant or in favor of an opposite party, by reason of which the judge is unable to impartially exercise his functions in the particular case. Ex parte American Steel Barrel Co., 1913, 230 U.S. 35, 33 S. Ct. 1007, 57 L. Ed. 1379. This court said, in Hurd v. Letts, supra:" (80 U.S. App. D.C. 223, 152 F. 2d 121)
>
> "'Nothing is now better established than the rule that a sufficient affidavit under the statute must state facts and reasons which tend to show personal bias and prejudice *regarding the justiciable matter pending* and must give support to the charge of a bent of mind that may prevent or impede impartiality of judgment.'" Citing Berger v. United States.
>
> "'Accordingly, the question in all such cases is whether the affidavit asserts facts from which a sane and reasonable mind might fairly infer personal bias or prejudice on the part of the judge. * * *' (Italics supplied.)"

One of the finest discussions of the entire law which should be applied to an affidavit of prejudice is found in the decision of Judge Yankwich in *Cole v. Loew's, Inc., et al.*, (S.D. Calif. 1948), 76 F. Supp. 872. After reviewing a number of decisions Judge Yankwich sums up as follows at pages 876 and 877:

> "The rulings in these cases may be summed up in this manner:
>
> "(1) The mere filing of an affidavit does not oust the judge from the cause.

"(2) The judge has the right to determine the legal sufficiency of the affidavit.

"(3) The bias or prejudice must be personal, i.e., antagonism or opposition to the litigant, or favoritism for his opponent.

"(4) Definite views on the Law, adverse rulings in the case on trial, or adverse rulings against the suitor in other cases or in cases involving similar facts do not constitute such disqualification, *even in a criminal prosecution.*"

Judge Yankwich has also discussed the easy and the hard way in *Cole* v. *Loew's, Inc., supra*, beginning at page 878.

If I were to do as I would like to do I would withdraw from this case immediately and assign it to one of my colleagues. This I do not feel free to do. As pointed out by Judge Yankwich, in the case cited, it is my obligation as a District Judge of the United States to weigh the merits of the affidavit and disqualify myself only if the affidavit demonstrates that I as a trial judge am "of a bent of mind that may prevent or impede impartiality of judgment." *Berger* v. *United States*, 1921, 255 U.S. 22, 33. Attention must be called to the fact that no facts are alleged to demonstrate any lack of impartiality up to this time. Defendant states generally that I have made it impossible for defendant to complete its present discovery proceedings as well as further discovery proceedings prior to the date again set within the past few days by the said trial judge.

The record shows that a pre-trial conference was held on Jan[illegible] 27, 1961, at which time there was a discussion of discovery and counsel were advised that a further pre-trial conference would be held in April, 1961. On April 11, 1961, further pre-trial conference was held. On October 2, 1961, there was a hearing on defendant Merrit-Chapman & Scott's

motion for production of documents. In an opinion dictated from the bench the motion was granted in large part. The court advised counsel that discovery should be completed by April, 1962; that a further pre-trial conference would be held at that time; that an attempt would be made to hear further motions in January, 1962; that the case would be tried in October, 1962, with briefs to be filed by September 1, 1962.

On April 7, 1962, a further pre-trial conference was held at which time counsel were advised that their discovery should be completed by August, 1962. Certain motions have been heard in regard to discovery without complaint from the defendant that their discovery procedures were being interfered with. In the absence of any other allegations of fact there is no basis for any conclusion that defendant's conduct of the case has been interfered with by the court.

The affidavit of prejudice does not allege that there has been any improper conduct on the part of the court or Mr. Bushnell, Sr., or Mr. Bushnell, Jr. This may be in part accounted for by the fact that Mr. Bushnell, Sr., was for many years a very highly respected member of the Supreme Court of Michigan.

No allegation has been made or could be made that I have had any improper association with Mr. Bushnell, Sr., or Mr. Bushnell, Jr., or anyone connected with the plaintiff, Mackinac Bridge Authority, or any of its counsel.

I cannot accept the conclusion reached by the affiant that the acceptance of an honor conferred by a fraternity of which I have been a member for many years, and which has conferred upon me many honors in this state and in other states, necessarily warps my judgment to the extent that I should disqualify myself to hear any case in which another honored member of the fraternity is a member of the law firm which represents one of the parties.

I find nothing in this affidavit which would be sufficient to demonstrate that there is prejudice of such character as would show "a bent of mind that may prevent or impede impartiality of judgment" as to the justiciable matter which is before the court. As to this aspect of the case I must follow Judge Yankwich and reject an attempt to disqualify which has no legal foundation to support it.

It will be unpleasant to continue in this case under these circumstances. I would much prefer to gracefully bow out. In good conscience I cannot do so on the basis of this affidavit.

In addition to the insufficiency of the affidavit there is further reason why I cannot disqualify myself for the reasons stated in the affidavit. Mr. Earl Waring Dunn, one of the attorneys for the defendant, has been a Mason for many years and is a member of the Scottish Rite of Free Masonry in the Valley of Grand Rapids, as I am. Any member of that organization is aware of the fact that George E. Bushnell, Sr., is and has been for several years the Sovereign Grand Commander.

At the time that I was nominated to receive the 33rd Degree in September, 1961, (to be conferred in September, 1962), the fact of the nomination was publicized in the public press of the State of Michigan, including the Detroit Free Press, The Grand Rapids Press, The Kalamazoo Gazette, and many other newspapers. I am sure that the fact was known to Mr. Dunn because he congratulated me sometime shortly after September, 1961, upon my nomination. Thus, the facts upon which the affidavit is based have been known to defendant's counsel for almost a year.

As stated in *Refior* v. *Lansing Drop Forge Co.*, C.A. 6, 1942, 124 F. 2d 440, at page 445:

> "The statute, by its express terms, requires diligence in filing the affidavit of disqualification and does not permit a litigant, after he has knowledge of the

alleged bias or prejudice of the trial judge and without notice, to go forward in the case before filing such affidavit after the facts of disqualification are know to him."

The knowledge of Mr. Dunn, who has been in this case since the defendant first filed its appearance, is necessarily chargeable to the defendant. I must, therefore, find that the affidavit is not only insufficient but it was not timely filed.

I am privileged to state that my colleagues who are sitting en banc with me, the Honorable Noel P. Fox and the Honorable Raymond W. Starr, concur in this opinion.

An order will be entered accordingly.

The next matter before the court is the motion of the defendant Merritt-Chapman & Scott for an order finding that requests for admissions by Merritt-Chapman & Scott Corporation directed to the plaintiff are admitted by the plaintiff.

Do you want to be heard, Mr. Deeb?

Mr. Deeb: We waive oral argument, Your Honor.

Judge Kent: Beg your pardon?

Mr. Deeb: I am waiving oral argument.

Judge Kent: Mr. Bushnell, do you want to be heard?

Mr. Bushnell: Reply to Mr. Deeb's position, Your Honor, in this matter having been submitted in briefs, I shall not impose further on the court's time in argument.

Judge Kent: This matter is before the court on a motion by defendant Merritt-Chapman & Scott Corporation for an order finding that requests for admissions by Merritt-Chapman & Scott Corporation directed to the plaintiff are admitted by the plaintiff, which was filed on August 21, 1962, and was renewed on September 7, 1962, when the

defendant became impatient because the court was occupied and unable to hear the motion at an earlier time.

The requests for admissions were originally filed on July 5, 1962, having been previously served upon the plaintiff, according to the proof of service, on the 19th day of June, 1962.

Subsequently, supplemental requests for admissions were filed on August 1, 1962.

In the original group there were 327 requests for admissions. In the supplemental requests for admissions this was increased until the total included 372 requests for admissions.

By stipulation filed on June 25, 1962, counsel stipulated that the plaintiff might have forty days from the time of receiving the requests in which to file its reply to the same with the clerk of the court. An order pursuant to the stipulation was filed on June 27, 1962. Proofs of service of both sets of requests for admissions, by affidavits subscribed and sworn to on the 14th day of August, 1962, were filed on the 15th day of August, 1962.

In connection with the motion to require that the plaintiff be deemed to have admitted the 372 requests, there have been answers and replies to the motion. The answers to the requests for admissions were filed on August 22, 1962, the day after defendant's motion to require the plaintiff to admit all of the requests.

On August 10, 1962, there was a conference in the court's chambers between Mr. Deeb and Mr. Bushnell, Jr., at which time Mr. Bushnell stated that it would be impossible for him to comply with the stipulation and order previously entered; that he needed an additional ten days. Mr. Deeb stated that he was unable to agree to such an extension. The court stated that the additional ten days would not interfere with the work of the court so long as the delay

did not interfere with the schedule previously set up for the disposition of this case. Thereafter, and on August 17, 1962, Mr. Deeb refused to sign a stipulation extending the time for the filing of the answers to the requests for admissions to August 22, the date on which they were actually filed.

When the present motion was filed with the court, on August 21, 1962, it had attached to it an affidavit by Joseph F. Deeb, dated August 10, 1962, reciting that no responses had been received, at which time Mr. Deeb was well aware of the fact that the plaintiff expected to serve answers to the requests for admissions on August 22, 1962. Mr. Deeb attached a proposed order pursuant to the motion, to be signed ex parte, and called the clerk of this court at Marquette, the seat of the court in the Northern Division, to find out whether the order had been signed.

Rule 36 of the Rules of Civil Procedure provide:

> "After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or set-

ting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder."

An examination of the authorities shows that most of the cases which hold that a request for admission must be answered within ten days or else stand admitted are cases in which no answer was ever filed. *Smyth* v. *Kaufman*, 2 Cir., 114 F.2d 40; *Water Hammer Arrester Corporation* v. *Tower*, 7 Cir., 171 F.2d 877; *Chicago, Rock Island & Pacific Railroad Co.* v. *Williams*, 8 Cir., 245 F.2d 397; *O'Campo* v. *Hardisty*, 9 Cir., 262 F.2d 621; *Woods* v. *Robb*, 5 Cir., 171 F.2d 539; *Timmons* v. *United States*, 4 Cir., 194 F.2d 357, and *West Kentucky Coal Co.* v. *Walling*, 6 Cir., 153 F.2d 582.

Obviously, no extension of time beyond the forty days for answer within such "longer time as the court may allow on motion and notice" was filed by the plaintiff.

In *Countee* v. *United States*, 7 Cir., 112 F.2d 447, at page 451, the Seventh Circuit, in ruling upon a similar situation, stated:

> "Plaintiff assigns as error the overruling of his motion to strike an answer of the defendant which was filed in response to plaintiff's written request for ad-

mission of certain facts. Rule 36(a), Rules of Civil Procedure * * *. The information was being sought by plaintiff for use in a pretrial conference and plaintiff's motion to strike was based on the fact that the answer was not filed within the time allowed by the rule. There is no indication of a lack of good faith on the part of the defendant and no prejudice was caused to plaintiff. The defendant had filed one answer within the time fixed by the rule and upon plaintiff's objection at a subsequent pretrial conference the court had granted an extension of time to the defendant to file another answer. The procedure was not strictly in accord with the rules but in view of the good faith of the defendant and the lack of any prejudice to the plaintiff the trial court did not err in overruling plaintiff's motion to strike the answer."

We feel that the District Court in Pennsylvania, in *Frankel* v. *International Scrap Iron and Metal Co.*, D.C. Pa., 157 F. Supp. 709, properly covered the situation when it said, at pages 713 and 714:

"It is a fact that International failed to answer or object to the requests for admission, and plaintiff points out that under Rule 36, Federal Rules of Civil Procedure, 28 U.S.C., same are deemed to be admitted.

"The admissions cannot be taken as controlling. Decision should not be based on mere matters of pleadings or technical admission. As the United States Supreme Court has pointed out at the current term, 'the purpose of pleading is to facilitate a proper decision on the merits,' Conley v. Gibson, 78 S.Ct. 99, 103 (Nov. 18, 1957). The opinion of Mr. Justice Black adds:

" ' * * * The Federal Rules reject the approach that pleading is a game of skill in which one misstep by

counsel may be decisive as to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf Maty v. Grasselli Chemical Co., 1937, 303 U.S. 197 * * * ."

In reaching a proper conclusion in this case, the court feels that it should consider the entire file and not only the present situation.

The record shows that the complaint was filed on September 6, 1960. Service was obtained upon the defendant Merrit-Chapman & Scott Corporation on October 6, 1960, as demonstrated by a proof of service filed with the clerk of the court on October 11, 1960. Pursuant to stipulation extending the time, the answer of the defendant, Merritt-Chapman & Scott was filed on November 14, 1960.

After some original difficulties resulting from a clash of personalities, it appeared to the court that discovery procedure was being pursued and that counsel were making every effort to obtain all of the information which could be obtained through the cooperation of counsel.

On April 12, 1962, an amended complaint was filed. On June 19, 1962, a stipulation was filed extending the time for the defendant Merritt-Chapman & Scott to file its answer to the amended complaint, extending the time until fifteen days after the plaintiff had served its answers to the requests for admissions upon the said defendant.

At all times until the 10th day of August, 1962, it appeared that counsel for all parties were attempting to cooperate in an effort to provide all of the information available so that the case, when heard, could be heard on the merits of the controversy. Even on that day, no indication was given by counsel for the defendant of any intention to exact the procedural penalty of a default. The motion filed on August 21, 1962, came as a complete surprise to the court, and we assume it was an equal surprise to counsel for the plaintiff.

As has been frequently stated, the Rules of Civil Procedure were devised to prevent default by technciality and trial for ambush. The only purpose of the rules was to eliminate the technical requirements of pleading which might cause a default on the part of a party because of failure to plead in such fashion that there was an adequate answer to, or failure to deny, a previous pleading. It was the intent of the drafters of the rules and of the Supreme Court of the United States in adopting the rules that pleadings should be simplified, that discovery should be resorted to, that technicalities should be abandoned, and that trial should be had upon the merits of the controversies.

No complaint was made by the plaintiff because of the failure on the part of the defendant Merritt-Chapman & Scott, in its requests for admission, to exhibit the documents described with the requests for admissions.

Under all the circumstances, and in view of the history of this case, this court is of the opinion that the imposition of the drastic remedy of default is not justified and should not be imposed upon the plaintiff. The serious mechanical problem of answering 372 requests for admissions in itself would require consideration for the counsel expected to answer such requests.

For the reasons stated, an order may be entered denying the motion filed by the defendant Merritt-Chapman & Scott Corporation to require that the plaintiff may be deemed to have admitted the 372 requests for admissions.

I am privileged to state that Judge Fox and Judge Starr, the other judges in this district, coneur in this opinion.

You may enter an order accordinly, Mr. Ziel.

All right, we will recess.

APPENDIX E

UNITED STATES OF AMERICA
THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Civil Action No. 761

MACKINAC BRIDGE AUTHORITY,
a Michigan statutory body
corporate,
Plaintiff,

- vs -

MERRITT-CHAPMAN & SCOTT CORPORATION,
a Delaware corporation,

and

PREPAKT CONCRETE COMPANY,
an Ohio corporation,
Defendants.

Motion For Continuance From October 1, 1962

NOW COMES Joseph F. Deeb, Attorney for Defendant Merritt-Chapman & Scott Corporation, associated with Earl Waring Dunn, and respectfully requests this Court to order a continuance of the trial upon the merits in the above captioned cause, from [illegible] dated September 11, 1962, received September 13, 1962 at 9:30 A.M., again setting this matter for trial, which is the third notification to the parties by letter order regarding the same trial date.

Our reasons, briefly detailed and most respectfully stated, are as follows:

1. That by reason of the disallowance, on the forenoon of the 21st day of September, 1962, of the Affidavit of Prejudice filed by Defendant Merritt-Chapman & Scott Corporation, and upon the denial on this same date of this.

Defendant's Motion dated August 20, 1962, and renewed by a separate motion filed September 7, 1962, to order all 372 Requests for Admission as admitted, and because the business of this Court, as repeatedly stated by this Court, will not allow any hearings on discovery procedures, even those pending, including Motion for Summary Judgment, this Defendant is now certainly placed in a position which obviously denies it the benefit of even the most ordinary use of the Federal Rules of Civil Procedure, and prevents it from presenting to this Court, before the trial date set, many valid objections to the Plaintiff's responses herein, which it refers to as follows:

a. The response filed in behalf of the Plaintiff is not a proper response because it is not sworn to by the Plaintiff.

b. The response is improper because it attempts to avoid an answer to many of this Defendant's Requests for Admission by substituting a statement of the admission of genuineness of documents in the place and stead of answering directly the requests made, even to the extent of admitting the genuineness of a document where no document is referred to in the request by reason of which this Defendant is prevented from having a sworn statement of the party on the matter requested.

c. That the Plaintiff has improperly sought to evade many of the Requests of this Defendant by a denial of the same supported by reasons which are, in fact, objections to the request, which objections should have been stated as objections, considered by this Court as such, and noticed by the Plaintiff pursuant to Rule 36.

d. That the Plaintiff has improperly answered some of said Requests by adopting as its answer, answers made to one or more previous requests, so that the answer made is indefinite, ambiguous, evasive and uncertain.

e. That if the trial of the within cause is held on October 1, 1962, there is no means open to this Defendant by which it can present the foregoing objections to the trial court,

2. Because, depending upon the Court's order after consideration of this Defendant's future petition with respect to the petition now in preparation will, in turn, depend this Defendant's future course of action again with respect to further discovery proceedings, and that in this connection the Court has been advised that the taking of a large numbers of depositions by this Defendant is dependent upon the outcome of Defendant's Requests for Admissions upon Plaintiff in the within cause.

3. The Motion for Summary Judgment filed in this cause and filed as of August 1, 1962, only because this Defendant desired to comply with the restrictive order requiring that all motions be filed by the latest, August 1, 1962, contained a reservation that the said Motion would have to be amended depending entirely upon Plaintiff's response to 372 Requests for Admissions under Rule 36 filed to date (with more Requests for Admissions under consideration) and dependent upon Plaintiff's compliance with the prior general order of this court re discovery, which included compliance with this Defendant's request for the photographs in connection with the Engineering Research Institute of the University of Michigan.

4. That further, and in conection with the Requests of this Defendant for Admissions from the Plaintiff, such determination as the Court may make as to the effect of the admissions directly affect the character and extent of the expert testimony which this Defendant will have to produce, and that it is impossible for this Defendant to confer with experts with reference to their serving as witnesses in this case until after this Defendant shall know what the Plaintiff has admitted in connection with this Defendant's Requests for Admissions.

5. That the foregoing reasons for this Motion for a substantial continuance of trial date beyond October 1st, 1962 are apparent upon the facts related herein, and this Court is respectfully requested to give this Defendant

notice, forthwith, if it is going to disallow this Motion for the reason that time is a material factor, and that otherwise, this Defendant cannot have a ruling on this Motion, since this Court is going to be absent from the jurisdiction commencing on Monday, September 24, 1962, and for an undetermined length of time after next Monday, and further because Appellate Procedure should not be taken by this Defendant until a final effort by this Defendant for a continuance, in spite of the fact that this Court has already indicated more than once, that it is adamant in the trial date it has set, namely, October 1, 1962

DATED: September 21, 1962

.....

Joseph F. Deeb, Attorney for
Defendant Merritt Chapman &
Scott Corporation
Business Address:
600 Michigan Trust Building
Grand Rapids 2, Michigan

OF COUNSEL:

.....

Earl Waring Dunn
Deeb, Dunn & Elferdink
600 Michigan Trust Building
Grand Rapids 2, Michigan

Manning, Hollinger & Shea
41 East 42nd Street
New York 17, New York

APPENDIX F

Opinion of the Court of Appeals

No. 14308

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMUEL G. ALBERT,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION, and HON. W. WALLACE KENT, Judge of said court,
Respondents.

Petition For a Writ of Mandamus and Prohibition

(Filed October 19, 1960)

Before: MILLER, CECIL and WEICK, Circuit Judges.

WEICK, Circuit Judge. This is an original action in mandamus and prohibition to compel the District Judge to certify his disqualification to hear a certain pending action and to prohibit him from conducting further proceedings therein because of his alleged personal bias and prejudice.

An affidavit alleging personal bias and prejudice on the part of the Judge in favor of and against certain parties and attorneys in said pending action in the District Court was filed by petitioner under the provisions of Title 28 U.S.C. paragraph 144.

The District Judge, upon consideration of the affidavit of personal bias and prejudice, held that it was insufficient to require him to disqualify himself and refused to do so. The present proceeding followed in an attempt to obtain a review of the order entered by him.

The mere filing of an affidavit of personal bias and prejudice against the District Judge did not result in his automatic disqualification.[1] The statute requires the affidavit to state something more than that the judge has a personal bias of prejudice. It provides that "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists . . ." Title 28 U.S.C. paragraph 144.

The District Judge had a duty to determine whether the statutory requirement has been met. To do so he was required to pass upon the legal sufficiency of the affidavit. In the consideration of the matter, he must accept the fact alleged in the affidavit as true, as they may not be controverted. *Green* v. *Murphy*, 259 F. 2d 591 (CA 3, 1958); *Eisler* v. *United States*, 170 F. 2d 273 (CA DC, 1948).

The order entered by the District Judge refusing to disqualify himself is not reviewable upon appeal until a final judgment has been entered in the case. *Collier* v. *Picard*, 237 F. 2d 234 (CA 6, 1956).

Before petitioner may resort to the extraordinary writ of mandamus, he must establish that he has a clear and certain right and that the duties of the respondent are ministerial, plainly defined and peremptory. *United States* v. *Wilbur*, 283 U.S. 414; *Girard Trust Co.* v. *Helvering*, 301 U.S. 540; *Rayborn* v. *Thomas, Warden*, ___ F. 2d ___ (CA 6, 1960).

---

[1] The decision in this case was criticized in an article entitled "Psychiatric Evidence In the Recusation of Judges" because of the claim that the court did not give proper effect to psychiatric evidence which had been offered. 73 Harvard Law Review 1325.

The opinion of the District Court is reported under the title of *United States* v. *Gilboy*, 162 F. Supp. 384 (DC MD, Pa., 1958). The District Judge finally did withdraw from the case in order that it could be expeditiously tried. *United States* v. *Gilboy*, 166 F. Supp. 220.

In our view, the consideration by the District Judge of the sufficiency of the affidavit of bias and prejudice is not a ministerial, but a judicial act.

Mandamus does not lie to compel a judge of an inferior court to reverse a decision made by him in the exercise of a legitimate jurisdiction. *Ex parte Flippin*, 94 U.S. 348 (1876), or to compel him to decide according to the dictates of any judgment but his own, *United States* v. *Lawrence*, 3 Dallas 42 (1795), or to control the exercise of his discretion. *Gottlieb* v. *Rubenstein*, 252 F. 2d 779 (CA 6, 1958). This remedy is reserved for really extraordinary causes. It may not be used as a substitute for appeal. *Roche* v. *Evaporated Milk Association*, 319 U.S. 21 (1943); *Beneke* v. *Weick*, 275 F. 2d 38 (CA 6, 1960).

The writ may be granted only where it is clear and undisputable that there is no other legal remedy. *Ex parte American Steel Barrel Co. and Seaman*, 230 U.S. 35 (1913).

Mandamus has been held not to be the proper remedy to compel a judge to recuse himself. *Green* v. *Murphy*, 259 F. 2d 591 (CA 3, 1958); *Korer* v. *Hoffman*, 213 F. 2d 211 (CA 7, 1954); *Hurd* v. *Letts*, 152 F. 2d 121 (CA DC, 1954).

In *Connolley* v. *United States District Court*, 191 F. 2d 692 (CA 9, 1951) the Court issued a writ of prohibition, but the footnote on page 693 of the opinion indicates that no question was raised over its power to do so. This decision was followed in *Gladstein* v. *McLaughlin*, 230 F. 2d 762 (CA 9, 1955) wherein the Court of Appeals felt it was unnecessary to issue the writ as the District Judge upon consideration of its opinion would refrain from proceeding further. In concurring, Circuit Judge Pope was of the view that the Court, in the same footnote in *Connelly*, had misconstrued the language of *Berger* v. *United States*, 255 U. S. 22, which was that "remedy by appeal was inadequate." id. 36. In *Korer* v. *Hoffman*, *supra* it was pointed out that what the Supreme Court in *Berger* was referring to was the efficacy of an appeal

if the District Judge had been authorized to decide upon the truth of the facts set forth in the affidavit of bias and prejudice. In any event, *Berger* was not a mandamus case, but was an appeal from a judgment of conviction in a criminal case.

In *Williams* v. *Kent*, 216 F. 2d 342 (CA 6, 1954) we passed upon the sufficiency of an affidavit of prejudice in a mandamus proceeding "assuming that a writ might appropriately issue in such a case" and held that it failed to show bias or prejudice personal to the District Judge.

In the present case, the District Judge, in an oral opinion, analyzed each of the claims of petitioner and the facts alleged in the affidavit in support of them and pointed out the reasons why the facts did not support the charge of bias and prejudice. In our judgment, he had jurisdiction to do so.

We have carefully examined the affidavit of personal bias and prejudice and are of the opinion that we would not be justified in issuing a writ of mandamus or prohibition. We do not believe that the facts alleged in the petition are sufficient to establish any bias or prejudice personal to the District Judge.

The Petition for a Writ of Mandamus and Prohibition is dismissed.

APPENDIX G

(Filed Dec 1962)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN THE MATTER OF MERRITT-
CHAPMAN & SCOTT CORPORATION,
Petitioner,

vs

HONORABLE W. WALLACE KENT,
United States District Judge
for the Western District of
Michigan,
Respondent.

Order

Before: CECIL, Chief Judge, MILLER and WEICK, Circuit Judges.

In view of the length of time this case has been pending in the District Court, we see no reason why proceedings, other than the trial of the case, should be stayed pending review by the Supreme Court. This will enable the parties to get the case ready for trial so that it may be tried when the Supreme Court has acted.

The petitioner's motion for a stay is, therefore, denied, without prejudice to renewal of the motion, in the event that the District Court assigns the case for trial before the Supreme Court has acted.

/s/ Paul C. Weick
United States Circuit Judge

APPENDIX H

Ford to Get High Degree

SLATED FOR HONOR AT MASONIC MEET

Rep. Gerald R. Ford of Grand Rapids will be among 14 Michigan Freemasons to receive the 33rd Degree—the highest degree of Scottish Rite Masonry—at the annual session of the fraternity in Philadelphia Sept. 20-27 at which 158 will receive the degree.

Percival F. Edwards, also of Grand Rapids, a retired Michigan Bell Telephone Co. official, also will receive the honor.

Others to Be Honored

The 33rd Degree also will be conferred on U.S. District Judge W. Wallace Kent of Kalamazoo, a past Grand Master of the Michigan Masons; Circuit Judge Donald E. Holbrook of Clare, Charles J. Strosacker of Midland, a Dow Chemical Co. executive; Ralph W. Moore of Birmingham, retired General Motors Corp. executive; Harold P. Mills of Farmington, a telephone company executive; William W. Merrill of Bloomfield Hills; Charles Fey of Lathrup Village; Earle W. Mott, a Detroit undertaker; Carl P. Stoliker of Port Huron, transportation executive; August B. Johnson of Mount Morris, retired building contractor; Fred B. Crego of Benton Harbor, packing firm executive, and Selmer E. Strand of Muskegon Heights, packaging engineer.

Michigan Masons will hold high positions at this 150th annual meeting of the Supreme Council, 33rd Degree for the Northern Masonic Jurisdiction of the United States.

George E. Bushnell, retired state Supreme Court justice, is Sovereign Grand Commander of Scottish Rite Freemasonry, and will preside over all sessions. Others include Clyde A. Fulton of Charlotte, Grand Master General of Ceremonies; Ernest L. Pearce of Marquette and Orville H. Foster Jr., Supreme Council members, and Dr. Malcolm D. MacQueen of Detroit, Grand Sword Bearer.